In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1041

ABRAHAM F. ZIMMERMAN, PETITIONER

v.

JOHN M. LEHMANN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 339 F. 2d 943.

JURISDICTION

The judgment of the court of appeals was entered January 7, 1965. The petition for a writ of certiorari was filed April 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The court of appeals found that petitioner was improperly excluded from the United States after a trip to Canada, because his return to the United

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States did not constitute a new "entry" under *Rosenberg* v. *Fleuti*, 374 U.S. 449. The court rejected on the merits petitioner's alternative argument as a bar to exclusion—that he had acquired derivative citizenship on the naturalization of an uncle who, petitioner claimed, had adopted him. The question presented is whether this Court should grant review to determine whether petitioner's alternative argument would be correct and applicable if he could show that he was in fact adopted as claimed.

STATEMENT

Petitioner, who was born in Russia in September 1902, entered the United States as a permanent resident in 1913, after the death of his parents, to join his uncle, Isadore Lande, at Fort Wayne, Indiana (R. 42–43). In 1953, after a trip to Canada, he was excluded from the United States as an alien not entitled to admission (R. 47, 73). After a hearing (during which he was paroled into the United States) he was found excludable by a Special Inquiry Officer (R. 29–40) whose decision was upheld by the Board of Immigration Appeals (R. 74–76). The order of exclusion was upheld by the District Court for the Northern District of Illinois (R. 20–27) but reversed by the court of appeals on the ground that petitioner's return to the United States after his trip to Canada did not constitute an "entry" within the meaning of Section 101(a)(13) of the Immigration and Nationality Act of 1952 as interpreted by this Court in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (Pet. App. 1a–10a).

At the exclusion hearing, petitioner claimed that he

had been adopted by his uncle, Isadore Lande, at Fort Wayne, Indiana, although he had never used the name of Lande (R. 43) and had no record of the adoption (R. 68). He said he had been advised of the adoption by his uncle at a time which he variously placed as 1935–1938 (R. 72) and six or seven years before the hearing (R. 68). On the basis of counsel's information, he placed the date of the alleged adoption in the fall of 1913, stating that the matter had been handled through a firm of lawyers, called Ryan and Ryan, of Fort Wayne, Indiana (R. 71). He at first said that his uncle was a citizen at the time of his adoption (R. 44), but subsequently, on the basis of information which counsel had obtained from a cousin, said his uncle had been naturalized on June 13, 1923, at Flint, Michigan, No. 1716512, Vol. 8 (R. 71).

Petitioner claimed that he had travelled to Europe in 1931 on an American passport (R. 45), but it was shown that the document was a certificate of identity (R. 57). He had been admitted to the United States in 1932 as a returning resident alien (R. 53). It was also shown that in 1927 petitioner had filed first papers for naturalization (R. 59) and in 1932 a petition for naturalization (R. 60), which was denied (see R. 31).

In holding petitioner excludable, the special inquiry officer stated that there was no provision of law by which citizenship was conferred on a child by reason of his adoption by a United States citizen (R. 31). On the basis of the various inconsistencies in petitioner's testimony, the documents as to his reentry in

1932, and his application for naturalization, the officer concluded that petitioner knew or had reason to believe that he was not a United States citizen when he entered the United States in 1953 (R. 37).

In his amended complaint in the district court, petitioner alleged that he was a native of Russia and "is now stateless" (R. 4). The district court therefore had no reason to pass on petitioner's claim of citizenship through adoption. In the court of appeals, however, petitioner did assert a claim of United States citizenship. The court of appeals undertook to pass on the issue because it was "jurisdictional inasmuch as the proceedings were instituted and the order of exclusion obtained on the basis that plaintiff was an alien, not a citizen" (Pet. App. 4a). It held, primarily on the basis of two opinions of the Attorney General (38 Op. Atty. General 217 and 397), that there was no statute which bestowed American citizenship on adopted minor aliens on the naturalization of their adoptive parents. The court of appeals therefore had no occasion to consider the factual issue as to whether petitioner had actually been adopted. Turning to the merits of the controversy, the Seventh Circuit held for petitioner, finding that petitioner's return from a trip to Canada did not constitute an "entry" under this Court's holding in *Rosenberg* v. *Fleuti*, 374 U.S. 449, and that therefore the order of exclusion was erroneous.

ARGUMENT

The court of appeals has held that petitioner's exclusion from the United States was improper. Thus

the particular issue which gave rise to the present proceeding—the excludability of petitioner—has been determined. Petitioner nevertheless asks this Court to pass on his claim that he acquired citizenship under the Act of March 2, 1907, by virtue of the naturalization in 1923 of his uncle, Isadore Lande, who allegedly adopted him in Indiana in 1913. We submit that review of the question of petitioner's citizenship in this context is unwarranted, not only because the exclusion proceeding against petitioner has been terminated in his favor, but also because review would involve deciding an intricate issue of statutory construction on a record lacking in substantial evidence that petitioner was in fact adopted.

Petitioner asks this Court to overrule an interpretation of the 1907 Act which was formalized by an opinion of the Attorney General in 1935, and on the basis of which Congress legislated in 1940. Section 316 of the Nationality Act of 1940 (54 Stat. 1146) made specific provision for the naturalization of an adopted child under 18 years of age on the petition of his adoptive citizen parents if the child had been lawfully admitted to the United States for permanent residence, adopted in the United States before reaching 16, and in the legal custody of the adoptive parents for at least two years prior to the filing of the petition for naturalization.[1] The legislative history of the 1940 Act, which was the result of a comprehensive study by representatives of the Departments of State, Labor and Justice, shows that the

[1] This has been carried over with additions as Section 323 of the 1952 Act, 8 U.S.C. 1434.

draftsmen of that legislation were of the opinion, which they conveyed to Congress, that no law of the United States then provided for the naturalization of an adopted child through the naturalization of his adoptive parents. See Hearings before the Committee on Immigration and Naturalization of the House of Representatives, on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., pp. 93, 362–363, 445–446. Under these circumstances, we think it is inappropriate for petitioner to ask this Court to decide a highly technical question of statutory construction (which, in view of the years that have elapsed and the enactment of the 1940 Act, cannot have any wide application) on the basis of a record which leaves so much doubt as to the factual predicate of petitioner's claim—his allegation that he was in fact adopted by his uncle.

There is nothing in the record before this Court, except petitioner's vague testimony that his uncle so told him, to show that petitioner was in fact adopted by his uncle. It is significant that petitioner was able, with counsel's assistance, to specify the exact time and place of his uncle's naturalization, but was unable to give any specific facts as to his adoption except that it was handled by a firm of lawyers in Fort Wayne, Indiana. The laws of Indiana in effect in 1913[2] provided for a petition for adoption in the applicable circuit court of the county; it should have been possible for petitioner, who had the name of the lawyers who allegedly handled the matter, to get

[2] Those laws are set forth as notes to Burns, Indiana Stat. Ann. 1933, 3–101.

the name and number of the proceeding and a record of his adoption. Indiana law provided that, on an appropriate finding, the court "shall make an order that such child be adopted, and from and after the adoption of such child, it shall take the name in which it is adopted." Yet petitioner testified that he never used his uncle's name. The record shows that petitioner traveled as an alien in 1931 and 1932 and that he applied for naturalization in 1932 (when he was 29 years old). Under these circumstances, there is no reason to credit petitioner's claim that he was in fact adopted. It is significant in this connection that the complaint in the district court, filed by the same attorneys who represented petitioner at the hearing before the Special Inquiry Officer, alleged that petitioner "although a native of Russia, is now stateless" (R. 4).

Petitioner is presently in the United States. He is not without remedy to establish a factual predicate for his present claim if it exists. Under Section 341 of the Immigration and Nationality Act of 1952, he may apply for a certificate of derivative citizenship on an adequate factual showing. The doctrine of collateral estoppel will not bar relitigation of the question of citizenship—an issue whose resolution was not "essential to the decision" below. *Yates* v. *United States,* 354 U.S. 298, 336. If his claim is denied on legal grounds, he may then seek judicial review of that legal issue. This Court should not now be asked to overturn a long-standing interpretation of the 1907 Act when there is no showing that petitioner has a factual basis for challenging that interpretation.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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